

**A Peggy Mavis Moreira (representing the estate of Frances
Theodara Eveleen Foenander, deceased) & Anor v
Manivail s/o Ramasamy**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-170
OF 1998

B SHAIK DAUD, MOKHTAR SIDIN AND DENIS ONG JJCA
31 MARCH 2001

*Civil Procedure — Appeal — Notice of — Filing of — Notice filed on behalf of appellant
by firm not retained by appellant — Whether notice defective*

C The respondent filed a writ of summons against the appellant seeking, inter alia, specific performance of a sale and purchase agreement. The second appellant was added as a party to the suit following an application to intervene. The High Court allowed specific performance of the agreement. The appellant appealed. The respondent filed a notice of motion seeking an order that the appeal be struck out. It was submitted that in the High Court the first appellant was represented by Messrs Xavier Norhaslinda & Associates while the second appellant was represented by Messrs Blanche Kayveas & Co. The notice of appeal was filed by Messrs Blanche Kayveas & Co purportedly on behalf of both the appellants. This was followed by filing of the memorandum of appeal which stated that the second appellant was the only one appealing against the High Court's decision. No mention was made of the position of the counterclaim by the second appellant which was also dismissed by the High Court. There was uncontroverted evidence that the first appellant never retained Messrs Blanche Kayveas & Co to act for her nor did she instruct them to appeal against the High Court's decision.

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Held, striking out the appeal:

G The initial notice of appeal filed by Messrs Blanche Kayveas & Co was defective as they had no authority to represent the first appellant when they filed the notice of appeal. The second appellant's case rested entirely on his counterclaim which was dismissed but the second appellant had not appealed against that dismissal. Order 64 r 1 of the Rules of the High Court 1980 was not applicable as Messrs Blanche Kayveas & Co had in fact conceded that they never represented the first appellant from the beginning. For these reasons, the court held that the notice of appeal was defective and therefore the appeal was not properly before the court (see p 82A-D).

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[Bahasa Malaysia summary]

I Responden telah memfailkan satu writ saman terhadap perayu memohon, antara lain, pelaksanaan spesifik ke atas satu perjanjian jual-beli. Perayu kedua ditambah sebagai satu pihak kepada guaman

tersebut berikutan satu permohonan untuk mencelah. Mahkamah Tinggi membenarkan pelaksanaan spesifik ke atas perjanjian tersebut. Perayu telah merayu. Responden telah memfailkan satu notis usul memohon satu perintah agar rayuan tersebut dibatalkan. Adalah dihujahkan bahawa di Mahkamah Tinggi perayu pertama telah diwakili oleh Tetuan Xavier Norhaslinda & Associates sementara perayu kedua telah diwakili oleh Tetuan Blanche Kayveas & Co. Notis rayuan tersebut telah difailkan oleh Tetuan Blanche Kayveas & Co bertujuan bagi pihak kedua-dua perayu. Ini diikuti dengan pemfailan memorandum rayuan yang menyatakan bahawa perayu kedua sahaja yang merayu terhadap keputusan Mahkamah Tinggi. Tiada disebutkan tentang kedudukan tuntutan balas oleh perayu kedua yang juga ditolak oleh Mahkamah Tinggi. Tiada keterangan yang dipertikaikan bahawa perayu pertama tidak pernah menggaji Tetuan Blanche Kayveas & Co untuk bertindak bagi pihak beliau mahupun beliau telah mengarahkan mereka untuk merayu terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan, membatalkan rayuan tersebut:

Notis rayuan yang terdahulu yang telah difailkan oleh Tetuan Blanche Kayveas & Co adalah cacat kerana mereka tiada autoriti untuk mewakili perayu pertama semasa mereka memfailkan notis rayuan tersebut. Kes perayu kedua berdasarkan keseluruhannya atas tuntutan balas beliau yang telah ditolak tetapi perayu kedua tidak merayu terhadap penolakan tersebut. Aturan 64 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak terpakai kerana Tetuan Blanche Kayveas & Co pada hakikatnya mengaku bahawa mereka tidak pernah mewakili perayu pertama dari mula. Oleh sebab demikian, mahkamah memutuskan bahawa notis rayuan tersebut adalah cacat dan justeru itu rayuan tersebut tidak betul di hadapan mahkamah (lihat ms 82A-D).]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 787–842.

Legislation referred to

Rules of the High Court 1980 O 64 r 1

Appeal from: Civil Suit No 22–199 of 1990 (High Court, Ipoh)

Kayveas (PC Low with him) (*Blanche Kayveas & Co*) for the appellants.
V Vijaya Segaran (*Maxwell Kenion Cowdy & Jones*) for the respondent.

Shaik Daud JCA. (delivering judgment of the court): This is an appeal from the decision of the High Court which had on 13 March 1998 allowed

- A specific performance of an agreement between the appellant and the respondent.

Briefly the facts are that the respondent and the first appellant had entered into an agreement dated 5 September 1990 whereby the respondent agreed to purchase a property held under CT No 5937 for Lot No 204 and a Lease of State Land No 598 for Lot 206 both in the Mukim of Ringlet in the District of Cameron Highland, Pahang, together with a bungalow house erected thereon from the appellant. The respondent paid a sum of RM80,000 to the solicitors of the first appellant as part payment towards a purchase price of RM160,000. The first appellant was alleged to have breached the said agreement by refusing to execute the transfer and by returning the sum of RM80,000. The respondent filed a writ of summons against the appellant seeking, inter alia, specific performance of the agreement and alternatively damages for breach of the agreement and costs. The second appellant was added as a party to the suit following an application to intervene vide order dated 4 January 1991.

- D The respondent however, filed a notice of motion seeking an order that the appeal be struck out on the grounds as set out in a supporting affidavit sworn by the respondent himself. He deposed that in the High Court the plaintiff (the present respondent) was represented by Messrs Maxwell Kenion Cowdy & Jones. The first defendant (the present first appellant) was represented by Messrs Xavier Norhaslinda & Associates while the second defendant (the present second appellant) was represented by Blanche Kayveas & Co. After the High Court handed down its decision by ordering specific performance of the agreement, notice of appeal was filed by Messrs Blanche Kayveas & Co purportedly on behalf of both the appellants. Incidentally the notice of appeal too gave the wrong date of the High Court order which should be 13 March 1998 instead of 12 March 1998. The significant issue is that the notice of appeal filed by Messrs Blanche Kayveas & Co was for both the appellants, when as earlier stated Messrs Blanche Kayveas & Co only represented the second appellant and not the first appellant. This was followed by filing of the memorandum of appeal which now states that the second appellant is the only one appealing against the decision of 13 March 1998 and is represented by Messrs Blanche Kayveas & Co. No mention is made of the position of the counter claim by the second appellant which was also dismissed by the High Court. Therefore in filing this notice of appeal, Messrs Blanche Kayveas purported to represent both the appellants but in filing the memorandum of appeal, they purported to represent only the second appellant. This error, if it was an error, was pointed out to Messrs Blanche Kayveas & Co by a letter dated 27 March 1998 from the solicitors for the first appellant but no effort was made to have it rectified. There is in fact uncontroverted evidence that the first appellant never in the first place, retained Messrs Blanche Kayveas to act for her nor did she instruct them to appeal against the 13 March 1998 decision. To this effect a letter dated 7 April 2000 was sent by her solicitors to Messrs Blanche Kayveas & Co and another letter of the same date to the Registrar of the court of Appeal. This was further confirmed by an affidavit

of the first appellant affirmed on 18 July 2000. In spite of all these, no effort was taken by Messrs Blanche Kayveas to rectify this. Therefore, it is clear that the initial notice of appeal filed by Messrs Blanche Kayveas & Co is defective as they had no authority to represent the first appellant when they filed the notice of appeal. The second appellant's case rested entirely on his counterclaim which was dismissed but the second appellant had not appealed against that dismissal. Dato' Kayveas while conceding that his firm never represented the first appellant from the beginning cited O 64 r 1 of the Rules of the High Court 1980, which provides thus:

A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and served in accordance with this rule, the former solicitor shall, subject to rr 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court.

With respect we think that this rule, in no way assists him as he has in fact conceded that he never represented the first appellant (who was the first defendant in the High Court) from the beginning.

For these reasons we hold that the notice of appeal is defective and therefore the appeal is not properly before us. We strike out the appeal with costs to the respondent against the second appellant only and order the deposit to go towards the account of costs.

Appeal struck out.

Reported by Jafisah Jaafar

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